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In the Supreme Court of the United States

OCTOBER TERM, 1932

No.——

THE UNITED STATES OF AMERICA, PETITIONER

v.

HARRY MURDOCK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered December 7, 1932 (R. 90), reversing a conviction under Section 1114 (a) of the Revenue Act of 1926 and Section 146 (a) of the Revenue Act of 1928.

OPINIONS BELOW

The opinion of the District Court sustaining a special plea in bar is reported at 51 F. (2d) 389. That decision was reversed by this Court, 284 U.S. 141. The charge of the District Court at the trial appears at R. 64–67. The opinion of the Circuit Court of Appeals (R. 87–90) is reported in 62 F. (2d) 926.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 7, 1932 (R. 90). A petition for rehearing was denied February 22, 1933 (R. 91). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a witness at a hearing authorized by Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, is immune from prosecution under Section 146(a) of the Revenue Act of 1928 for refusal to answer questions properly propounded to him if he acted in good faith and under an actual but erroneous belief that he was not required to answer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Appendix, *infra,* pp. 8–10.

STATEMENT

The respondent was summoned pursuant to the provisions of Section 1104 of the Revenue Act of 1926 as amended by Section 618 of the Revenue Act of 1928[1] (*infra,* p. 10), and, upon being sworn,

[1] Section 618 of the Revenue Act of 1928 authorizes the Commissioner of Internal Revenue, for the purpose of ascertaining the correctness of any return or for the purpose of

refused to answer certain questions propounded to him. He was indicted under Section 1114 (a) of the Revenue Act of 1926, and Section 146 (a) of the Revenue Act of 1928 (*infra*, pp. 9–10) for willfully failing to give testimony and supply information (R. 2–7). He filed a special plea to the indictment alleging that his refusal was based upon fear that his answers might incriminate him under State laws, and the District Court sustained the plea. *United States* v. *Murdock*, 51 F. (2d) 389. A direct appeal was taken to this Court, where the decision of the District Court was reversed. *United States* v. *Murdock*, 284 U.S. 141.

The case was thereupon tried in the District Court (R. 12–13). During the trial the respondent requested the court to instruct the jury (R. 67):

> * * * to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that they should consider that in determining whether or not his refusal to answer the questions was willful.

The Court refused this request (R. 67), having theretofore instructed the jury as follows (R. 66):

> You will observe that the offense charged here is the willful failure or refusal to fur-

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making a return where none has been made, to "require the attendance of the person rendering the return" and to "take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

nish information. That means, Gentlemen of the Jury, that having an opportunity to do so he deliberately designed not to furnish the information.

In the evidence before you and in the discussions by counsel, you have heard much about incrimination or self-incrimination; and in the testimony that was taken before the Revenue Agent the defendant here refused to answer questions because to do so might incriminate or degrade him, particularly under the state law. In fact, there is one place in the evidence where he expressly says that he refuses to answer because to do so might incriminate him under the state law. You are instructed, Gentlemen of the Jury, that he had no right to interpose that objection to the giving of the information which it was sought to have him give to the agent.

Gentlemen of the Jury, there is only one question here for you to decide, and that is whether or not this defendant willfully refused to give information which the Government sought to secure from him. Now, if he did so refuse and if you should so find from the evidence, he is guilty. If he did not, he is not guilty.

The respondent was found guilty (R. 12–13, 68) and was sentenced to a year in jail and fined $5,000 (R. 14). An appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, where the judgment of the District Court was reversed on

the ground that the requested instruction should have been given (R. 90).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that it was reversible error for the District Court to refuse to instruct the jury that they should consider the respondent's good faith and actual belief in determining whether or not his refusal to answer the questions propounded to him was willful.

REASONS FOR GRANTING THE WRIT.

1. The principle of the decision of the court below is in direct conflict with the decision of this Court in *Sinclair* v. *United States,* 279 U.S. 263, and with the decision of the Court of Appeals of the District of Columbia in *Chapman* v. *United States,* 8 App. D.C. 302, 317.

In *Sinclair v. United States, supra,* this Court held that an intentional refusal to answer questions propounded by a committee of the Senate was punishable, even though the refusal was in good faith. It said (p. 299):

> The gist of the offense is refusal to answer the pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. * * * He was bound rightly to construe the statute. His mistaken view of the law is no defense.

The question presented in *Chapman* v. *United States,* 8 App. D.C. 302, *supra,* was similar. The court said (p. 317):

> The refusal to answer necessarily implies wilfullness in the legal sense, and the question of bad faith or evil intent has no place whatever in the case. * * * He must be held to have intended the result which followed his refusal, which was the defeat of the pending investigation, which failed for the want of such testimony as was sought from him; and so far as that investigation was concerned, it was plainly a matter of no consequence that he may have believed himself to have been justified.

The trial court instructed the jury that the word "willful" means that "having an opportunity to do so he deliberately designed not to furnish the information" (R. 66). This instruction, we believe, accurately defined the meaning of the word as it is used in the statutes in question. The implication contained in the instruction requested by the respondent was that a witness may refuse to answer with impunity if he believes in good faith that he is not required to answer. The decisions already cited show that this was not a correct statement of the law.

2. The question whether a witness, acting in good faith and under an actual but erroneous belief that he is not required to answer questions propounded to him, may refuse to answer such ques-

tions with impunity is of general importance. If recusant witnesses may rely upon their own judgment or the advice of counsel and refuse to answer questions propounded to them at an inquiry under Sections 1104 of the Revenue Act of 1926 and 618 of the Revenue Act of 1928 with impunity, it is manifest that the purpose of these and similar statutes will be largely defeated, and such witnesses will be afforded a ready and convenient means of subverting the unquestioned power of Congress to compel testimony in the enforcement of the internal revenue laws.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1933.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 50, 113, 116:

> SEC. 256. All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income * * * shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment.
>
> * * * * * *
>
> When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income.
>
> * * * * * *

(U.S.C.App., Title 26, Sec. 1023.)

SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons. (U.S.C.App., Title 26, Sec. 1247.)

SEC. 1114. (a) Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * *

(U.S.C., Title 26, Sec. 1265.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 836, 878:

SEC. 148. [This section is identical with Section 256 of the 1926 Act above quoted.]

SEC. 618. EXAMINATION OF BOOKS AND WITNESSES.

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"SEC. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

SEC. 146. (a) [This section is identical with Section 1114 (a) of the 1926 Act above quoted, except that the word "title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 Act.]

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